

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-221202

DATE: December 31, 1985

MATTER OF: Spectrum Enterprises

DIGEST:

1. Protests of government's delay under contract and the temporary suspension of progress payments under contracts are matters of contract administration and are not for consideration by GAO under its Bid Protest Regulations, 4 C.F.R. part 21 (1985).
2. GAO will not review an agency's rejection of a small business as nonresponsible where the bidder did not file an application with the Small Business Administration for a certificate of competency.
3. Agency's action refraining from issuing an award to small business was not improper during pendency of an appeal by the agency of Small Business Administration's determination to issue a certificate of competency.
4. GAO will review agency suspension of bidder after bid opening to ensure that agency has not acted arbitrarily to avoid awarding a contract to that apparent low bidder. In view of criminal investigation, including allegations of wrongdoing made by former employees of the suspended concern, agency suspension action was not without a reasonable basis.

Spectrum Enterprises (Spectrum) a small business, protests several successive nonresponsibility determinations made by Department of the Army procurement officials under solicitations where Spectrum apparently submitted the low offer. Spectrum also protests the Army's "delay" in awarding it a contract as low offeror under a solicitation where the Small Business Administration was prepared to issue it a certificate of competency. In addition, Spectrum protests its suspension by the Army as a government contractor. Lastly, Spectrum protests the action whereby the Defense Logistics Agency has temporarily suspended

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progress payments under contracts which Spectrum had been awarded.

The protest is denied in part and dismissed in part.

Spectrum advises that it is a small business which is wholly dependent on government contracts and that from June to August 1985 it submitted the low offer under six solicitations under which it was subsequently found to be nonresponsible. These solicitations were apparently issued by the Department of the Army. The protester advises that on June 19, 1985, under authority of a search warrant, Department of Defense investigators together with federal marshals confiscated its business records back to 1983. Spectrum states that shortly thereafter, on June 28, 1985, progress payments to it under ongoing contracts it had been awarded were suspended until on or about August 25, 1985. The protester advises in part that the suspension of these progress payments jeopardized its timely performance under contracts it had been awarded. Spectrum advises that subsequent to the seizure of its records and the suspension of progress payments, the government performed several preaward surveys and "desk surveys" which apparently resulted in nonresponsibility determinations. Spectrum states that one such survey dated July 30, 1985, obtained by it under the Freedom of Information Act, concluded that Spectrum's financial condition was unsatisfactory due to Spectrum's delay in paying its vendors. Spectrum states that based on these preaward surveys, which were unfavorable, the respective contracting officers determined that it was financially nonresponsible. Spectrum asserts that its delays in paying its vendors were caused by the government's delay of work under contracts and the suspension of progress payments.

Spectrum challenges the propriety of the government's delay of work and suspension of progress payments under the contracts which it had been awarded. These complaints involve matters of contract administration which are the responsibility of the contracting agency and are not considered under our Bid Protest Regulations. See 4 C.F.R. § 21.3(b)(1) (1985) and American Mutual Protective Bureau, B-213875, Dec. 29, 1983, 84-1 C.P.D. ¶ 40.

Spectrum alleges that the Army acted in bad faith in making its nonresponsibility determinations since it asserts that the real basis for the unfavorable preaward surveys was not its financial responsibility but the ongoing criminal

investigation. Spectrum advises that the Army's determinations of nonresponsibility were apparently referred to the Small Business Administration (SBA) since the SBA contacted it concerning its right to request a certificate of competency (COC). The protester states that, in the belief that the nonresponsibility determinations were based on its financial responsibility, it elected to file an application for a COC under only one solicitation--DAAH01-85-R-0409, issued by Headquarters, United States Army Missile Command, Redstone Arsenal, Alabama--since it thought this would enhance its chances of receiving a COC. Spectrum maintains that if these nonresponsibility determinations had in fact cited "lack of integrity" as the reason for the denial of awards (which Spectrum believes was the actual reason), it would have applied for a COC under all the solicitations. The protester asks us to review these nonresponsibility determinations in view of the bad faith shown by the Army's allegedly misleading it as to the actual basis for its nonresponsibility determinations. Spectrum advises that the SBA was prepared to issue a COC in response to the one application for a COC which it had filed. As for the other nonresponsibility determinations for which Spectrum did not file an application for a COC, our Office will not review such determinations.

Where the procuring agency has referred the contracting officer's negative responsibility determination to the SBA as required by 15 U.S.C. § 637(b)(7) (West Supp. 1985), for consideration under the SBA's COC procedures, it is the responsibility of the small business firm to file a complete and acceptable COC application with the SBA in order to avail itself of the possible protection provided by statute and regulations against unreasonable determinations by contracting officers as to its responsibility. Ion Exchange Products, Inc., B-218578, B-218579, July 15, 1985, 85-2 C.P.D. ¶ 52 at 2-3. Where the small business concern fails to file a timely application for a COC with the SBA, our Office will not question the contracting officer's negative responsibility determination since such a review, in effect, would amount to a substitution of this Office for the agency specifically authorized by statute to review these determinations. Id. In any event, we note that a showing of bad faith or bias requires undeniable or irrefutable proof that the agency had a specific and malicious intent to

injure the party alleging bad faith. A.R.E. Manufacturing Co., Inc., B-217515, B-217516, Feb. 7, 1985, 85-1 C.P.D. ¶ 162. Spectrum has not produced evidence which would meet its heavy burden of proof that the procurement officials involved acted in bad faith in connection with the nonresponsibility determinations.

Spectrum asserts that by repeatedly determining that it was a nonresponsible offeror, the Army in effect subjected it to a de facto debarment--an improper action. We have held that successive nonresponsibility determinations by an agency of a small business did not constitute a de facto debarment by the agency where in each instance the agency's nonresponsibility determination was subject to the SBA's authority to conclusively determine the responsibility of a small business. See Sermor Inc., B-219173, July 17, 1985, 85-2 C.P.D. ¶ 56 and B-220277, Sept. 20, 1985, 85-2 C.P.D. ¶ 317. Since the successive nonresponsibility determinations regarding Spectrum were referred to the SBA by the Army, we are of the view that such nonresponsibility determinations did not constitute a de facto debarment.

Spectrum also protests the Army's delay in awarding it a contract under solicitation No. DAAH01-85-R-0409, the one solicitation for which it had filed an application for a COC. Spectrum states that the SBA was prepared to issue it a COC for that procurement on or about September 27, 1985, but that the Army delayed making award so that Spectrum had not received such award by November 15, the date it was suspended as a government contractor by the Army. Spectrum asserts that it should receive award under the cited solicitation or that, in the alternative, no other concern should be awarded a contract under the solicitation. The enclosures submitted by Spectrum with its protest indicate that the Army had submitted a timely appeal to the SBA of the issuance of a COC to Spectrum. See Federal Acquisition Regulation (FAR), § 19.602-3(c), Federal Acquisition Circular 84-5, April 1, 1985, and Department of Defense (DOD) FAR Supplement, 48 C.F.R. § 219.602-3 (1984). The Army was under no obligation to make award to Spectrum during the pendency of the appeal. See DOD FAR Supplement, 48 C.F.R. § 219.602-3(b)(2) (1984). See also J.R. Youngdale Construction Co., Inc., B-219439, Oct. 28, 1985, 85-2 C.P.D. ¶ 473 at 6.


Spectrum also protests the suspension action taken against it by the Army. Our review of an agency action to suspend an offeror after bid opening is to ensure that the

agency in suspending a bidder after bid opening has not acted arbitrarily to avoid awarding a contract to that apparent low bidder. ALB Industries, Inc., B-207335, Aug. 9, 1982, 82-2 C.P.D. ¶ 119.

We have reviewed the suspension report prepared by the Defense Criminal Investigative Service and forwarded to the suspending officer and are unable to conclude that the Army acted arbitrarily in suspending Spectrum.

Finally, Spectrum claims bid preparation costs for those solicitations where it was found nonresponsible but did not file a COC with the SBA. In view of our dismissal of Spectrum's protest with regard to such nonresponsibility determinations, the request for payment of the costs of bid preparation is denied. See Mechanical Equipment Company, Inc., B-213236, Sept. 5, 1984, 84-2 C.P.D. ¶ 256.

In accordance with the above, the protest is dismissed in part and denied in part.

for 
Harry R. Van Cleve
General Counsel